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J & K Floral USA, Inc. and Nahu Armando Ceballas Palma. Case 02–CA–185241

March 23, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent, J & K Floral USA, Inc., has failed to file an answer to the amended complaint. Upon a charge and amended charge filed by employee Nahu Armando Ceballas Palma, on September 29 and November 29, 2016, respectively, the General Counsel issued a complaint and an amended complaint on October 26 and December 14, 2017,¹ respectively, against the Respondent, alleging that it has violated Section 8(a)(1) of the Act. Although it was properly served with copies of the charges and the complaint and amended complaint, the Respondent failed to file an answer.

On December 29, the General Counsel filed a Motion for Default Judgment with the Board. On January 5, 2018, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days of service of the complaint, unless good cause is shown. Here, the October 26 complaint affirmatively stated that unless an answer was received by November 9,² the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the motion for default judgment disclose that the Region, by letter dated November 9, notified the Respondent that it had failed to file an answer to the complaint, extended the deadline for

the Respondent to file an answer by an additional 15 days, and again notified the Respondent that unless an answer was received by November 24, a motion for default judgment would be filed.

On December 14, the General Counsel issued the amended complaint, which was served by certified mail on the Respondent and the Respondent's counsel the same day. The General Counsel modified the remedy sought, but did not add any new allegations. On December 20, the Respondent refused delivery of the amended complaint.³ The Respondent failed to file an answer to the amended complaint.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the amended complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a New Jersey corporation with a principal place of business at 1 Ackerman Avenue, Clifton, New Jersey (the Facility), and has been engaged in the retail sale of flowers and Christmas trees at various stoop line stands in New York, New York, directly to members of the public. Annually, in conducting its operations, the Respondent derived gross revenues in excess of \$500,000, purchased and received at its Clifton, New Jersey facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of New Jersey, and sold goods valued in excess of \$5000 directly to points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

¹ All dates are in 2017 unless otherwise stated.

² On November 9, the Regional Director issued an erratum correcting p. 5 of the complaint, which by clerical error, inadvertently stated that the Respondent was required to file an answer by October 9, a date prior to the issuance of the complaint. The erratum informed the Respondent of the correct deadline, November 9, and was issued the same day the clerical error was discovered by the Region.

³ It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd.* sub nom. *NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).

Hyun Ok “Joe” Cho	-	President and Owner
Il Sup Park a.k.a. “Pedro”-		Supervisor/Manager
Kyung Seon Cho	-	Accountant/Agent

1. (a) On or about August 1, 2016, the Respondent’s employees, including Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago (the discriminatees), engaged in concerted activities with each other and with other employees, for the purpose of mutual aid and protection, by demanding that the Respondent bring terms and conditions of employment, including employees’ wages, hours, and working conditions, into accordance with the requirements of New York State and Federal law.

(b) On or about August 8, 2016, and again on August 15, 2016, the Respondent reduced the wages of Nicolas Garcia Hernandez.

(c) On or about August 20, 2016, the Respondent reduced the wages of Salvador Campos Benitez.

(d) On or about August 22, 2016, and again on August 29, 2016, the Respondent reduced the wages of Nahu Armando Ceballos Palma.

(e) On or about August 28, 2016, the Respondent terminated the employment of Ricardo Agustin Santiago.

(f) On or about August 29, 2016, the Respondent terminated the employment of Ruben Lopez.

(g) On or about September 5, 2016, the Respondent reduced the wages of Francisco Garcia Castro.

(h) On or about September 7, 2016, the Respondent terminated the employment of Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, and Nahu Armando Ceballos Palma.

(i) The Respondent engaged in the conduct described above in subparagraphs (b)—(h), because the discriminatees engaged in the concerted activities described above in paragraph (a), and to discourage employees from engaging in these or other concerted activities.

2. On or about August 8, 2016, the Respondent, by Hyun Ok Cho, adjacent to the Westside Deli, at 700 Amsterdam Avenue, New York, New York, interrogated its employees about their protected concerted activities, specifically concerning the employees’ participation in the concerted activities described above in paragraph 1(a).

3. On or about August 8, 2016, the Respondent, by Hyun Ok Cho, outside the Westside Deli, at 700 Amsterdam Avenue, New York, New York, promised its employees the opportunity to operate their own retail flowers shops, on the condition that the employees refrain from engaging in protected concerted activities, as described in paragraph 1(a).

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1(b)—(i), 2, and 3, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. The Respondent’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) by reducing the wages of, and terminating, Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago because they engaged in protected concerted activities, we shall order the Respondent to offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay resulting from the Respondent’s reduction of the discriminatees’ wages shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 501 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Backpay resulting from the discriminatees’ subsequent unlawful discharges shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate the discriminatees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*. We shall further order the Respondent to compensate the discriminatees for any adverse tax consequences of receiving lump-sum backpay

awards and to file with the Regional Director for Region 2 a report allocating the backpay awards to the appropriate calendar year for each discriminatee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).⁴

ORDER

The National Labor Relations Board orders that the Respondent, J & K Floral USA, Inc., Clifton, New Jersey, its officers, agents, successors, and assigns shall

1. Cease and desist from
 - (a) Reducing employees' wages because they engaged in protected concerted activities.
 - (b) Terminating employees because they have engaged in protected concerted activities.
 - (c) Interrogating employees about their protected concerted activities.
 - (d) Promising employees benefits on the condition that they refrain from engaging in protected concerted activities.
 - (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful reduction of their wages, in the manner set forth in the remedy section of this decision.
 - (c) Make Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago

⁴ In the complaint and Motion for Default Judgment the General Counsel requests that the notice be posted in English and Spanish, and we grant this request.

The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America Local 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(d) Compensate Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharges of Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful discipline and discharges will not be used against them in any way.

(f) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days of service by the Region, post at its Clifton, New Jersey facility copies of the attached notice marked "Appendix" in both English and Spanish.⁵ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 23, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT reduce your wages because you engaged in protected concerted activities.

WE WILL NOT terminate you because you have engaged in protected concerted activities.

WE WILL NOT interrogate you about your protected concerted activities.

WE WILL NOT promise you benefits on the condition that you refrain from engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago whole for any loss of earnings and other benefits resulting from our unlawful reduction of their wages, plus interest.

WE WILL make Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

J & K FLORAL USA, INC.

The Board's decision can be found at www.nlr.gov/case/02-CA-185241 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

